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In The
Supreme Court of the United States
October Term, 1977

No. 77-1607

JOHNSON, DRAKE & PIPER, INCORPORATED,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

**BRIEF FOR RESPONDENT IN
OPPOSITION TO PETITION FOR CERTIORARI**

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Preliminary

This case arose out of a contract between petitioner contractor and respondent State whereby petitioner agreed to construct an elevated highway in the Borough of Queens, City and State of New York. After completion of its work petitioner filed a claim in the State Court of Claims alleging various breaches.

After trial of all the issues the New York Court of Claims made an award on a limited number of claims, but dismissed the major claims (Decision unreported). Following this petitioner appealed to the New York Department Appellate Division which unanimously affirmed (49 AD2d 776). Petitioner then appealed to the New York State Court of Appeals New York State's highest Court, which also affirmed (43 NY2d 677).

Petitioner now seeks review by this Court of two questions involving alleged denial of due process rights under the Four-

teenth Amendment of the United States Constitution. It is respondent's contention that there is no jurisdiction under 28 U.S.C. § 1257(3) since petitioner never raised these federal questions in the State Courts.

It is respondent's further position that the use of a claims analysis by the Trial Court (which is the subject on which petitioner now asserts Fourteenth Amendment rights) was primarily a matter of admissibility of evidence and the ruling of the State's highest Court on such evidentiary issue is controlling.

Statement of the Case

Petitioner, a large construction firm, entered into a contract, dated October 31, 1966, with respondent State for the construction of a portion of Van Wyck Expressway in the Borough of Queens, City of New York. Petitioner had been low bidder on the project with a bid of \$11,097,756.50.

Although required by the contract documents to make a thorough investigation of the site before bidding, petitioner made only an extremely limited investigation of subsurface conditions. In actual performance, petitioner encountered difficulties it did not anticipate including pile lengths running longer than estimated. Petitioner made a late start in its cofferdaming work in the Flushing River and experienced the collapse of a number of inadequate cofferdams which delayed the work and added to the expense. Petitioner had difficulties coordinating within its own subcontractors and other contractors.

The agreed completion date for the contract was October 30, 1963. In accordance with contract requirements petitioner submitted a progress schedule which showed accomplishment of the various components of the work by this stipulated date. Early in performance it was apparent that petitioner was not staying up with its own progress schedule, particularly in connection with the rate of pile production.

When petitioner fell behind, the State made efforts to have petitioner increase its forces and production to accomplish the work by the agreed date. Petitioner claimed this "acceleration" was an actionable breach of contract.

By making additional effort, petitioner almost caught up with its progress schedule by the end of the original performance period.

After completion, petitioner filed a claim with the State Court of Claims alleging a number of causes of action for breach and seeking some \$4 million in addition to what it had been paid under the contract.

Opinions Below

New York Court of Claims (Trial Court)

After a lengthy trial in which petitioner was given an opportunity to present its proof, the Court of Claims rejected the principal causes of action asserted by petitioner, although allowing recovery of various smaller items. The Court found that petitioner had made a totally inadequate site investigation and was indifferent to its contract responsibilities. It rejected petitioner's "acceleration" damages theory noting petitioner's lack of progress on its own schedule. The Court discussed various causes of action and subcomponents thereof in considerable detail in a decision running some 62 pages in length. The opinion is unreported.

New York Appellate Division (49 NY AD2d 776)

In a unanimous decision, the Appellate Division, Third Department, affirmed the judgment of the Court of Claims. It noted that petitioner had made only a cursory site investigation and that it was put on notice by other contract specifications that a dynamic pile driving technique would be used. It further affirmed findings of petitioner's errors in cofferdam design. It

noted that the State, when attempting to accelerate, was seeking completion of the project by the agreed upon date.

Upon such appeal petitioner argued against use or reliance by the Trial Court on a claims analysis prepared by the State's project designer and construction consultant, Tippetts - Abbott - McCarthy - Stratten. The Appellate Division held that the Court of Claims was entitled to rely upon the analysis to the extent it deemed justified at reaching its decision and noted that the Court had specifically informed the parties it would disregard any objectionable material therein.

New York Court of Appeals (43 NY2d 677)

In a unanimous decision the New York Court of Appeals affirmed the order of the Appellate Division. It held that issues regarding claimed overruns in pile foundation work and claimed delays and alleged misrepresentations affecting pile foundation work and the scope of cofferdam work being resolved by the Court of Claims and such resolutions being affirmed by the Appellate Division, were beyond the scope of its review.

The Court of Appeals agreed that in the light of the express qualifications on its use stated by the trial judge, the Court of Claims was entitled to utilize the claims analysis prepared by the project designer and consultant to the extent it deemed justified in reaching its decision.

Questions Involved

1. Did the petitioner properly raise in the State Courts the purported federal questions it now seeks to argue?
2. Does the State trial court's admission into evidence and reliance on a claims analysis and the state appellate courts' approval of such reliance constitute a substantial federal question in any event?

Reasons for Denying Certiorari

A.

Petitioner now seeks to have this Court review two purported due process questions under the Fourteenth Amendment of the Constitution of the United States (Br., p. 2).

However, petitioner never presented any such federal questions in all the state court proceedings. Under 28 U.S.C. § 1257 (3) in order to confer jurisdiction on this Court, the federal right claimed must have been "specially set up or claimed" in the courts below. It was held in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1869) that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right". In the case at bar we do not even have a mere inference of such questions.

Petitioner never referred to the Fourteenth Amendment provision it now asserts in any of its arguments in the state courts.

Strangely, it states the "stage in the proceedings at which the denial of due process herein became fully apparent was after trial, at the time of the *decision* of the Court of first instance" (Br., p. 6). If that is so, why did not petitioner assert such right in its appeal to the Appellate Division from this decision?

Petitioner's Appellant's Brief to the Appellate Division attacked the use of the claims analysis as a separate point of argument, but did not even mention the United States Constitution. It raised no federal questions. Under questions involved in such brief, it stated:

"6. Was a State claim report, prepared by the State's Resident Engineer after this action was commenced properly admitted into evidence and entitled to any probative weight?

"The Court below received the report into evidence and accorded it great probative weight in its decision."

Petitioner attempts to rely on *United States v. El Paso Natural Gas Co.*, 375 U.S. 651, 656, 657 (Br., p. 7). But *El Paso* did not involve a constitutional question but the adequacy of findings. Petitioner's Reply Brief in the Appellate Division likewise omitted any federal question. If a constitutional question were to be raised under New York law, it should have been raised in the Trial Court or in the Appellate Division.

Petitioner's Appellant's Brief to the Court of Appeals again raised no federal question in regard to use of the claims analysis. There was no mention of the United States Constitution. At most petitioner introduced at this stage a question predicated on its view of the separation of powers, i.e., it attacked judicial dependency by the State Court of Claims on a review offered by the executive branch (apparently the State Department of Public Works). This was not a federal question. Petitioner made one comment that "[This] is utterly contrary to the intent of the Constitution" but nothing identified this as the federal Constitution. The context it appeared in was claimant's argument regarding separation of branches of state government. Again its Reply Brief in the Court of Appeals is silent as to raising a federal question. Even if at this point it had raised a state constitutional question, it would have been untimely. A constitutional question cannot be raised for the first time in the Court of Appeals. *Nathan v. Equitable Trust Co.*, 250 N.Y. 250, 253 (1929).

Finally, in petitioner's application in the New York Court of Appeals for reargument (which petitioner depends on for extending the time to file this petition for a writ of certiorari) petitioner raised no federal question. It did not even mention the claims analysis.

B.

The State courts are empowered to rule on admissibility of evidence in local State matters. Here all courts below, including the highest state court, upheld the admissibility and use of this documentary material. Further review by this Court, it is submitted, would be inappropriate " * * * we rarely disturb local decisions on questions of local practice, and we see no reason to do so in this instance" *Sanford v. Ainsa*, 228 U.S. 705, 707 (1913). There is a lack of a federal question. "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs" *Bell Telephone Co. of Penna. v. Penna. Public Utility Comm.*, 309 U.S. 30, 32 (1940).

Although petitioner attacks the use of the claims analysis with generalities in its brief, it does not give this Court the background against which this analysis was received in evidence.

This was not a simple, single issue lawsuit. It was a multi-cause of action construction contract claim involving technical subject matter. There was a mass of documents and records presented to the Trial Court. Claimant also submitted over 500 exhibits, some with little accompanying testimony.

The claims analysis was an organized approach to the issues. "New devices may be used to adapt the ancient institution [trial by jury] to present needs and to make of it an efficient instrument in the administration of justice" *Mtr. of Peterson v. U.S.*, 253 U.S. 300, 309-310 (1920). The analysis discussed the various causes of action and components thereof as amplified by the Bill of Particulars. Its format followed the order of the claim.

The analysis contained a chronological reference to events occurring on the project. It included a tremendous amount of factual data as part of its discussions. Much of this factual data

could be traced to the project engineer's diaries and the inspector's reports which were in evidence. It contained frequent quotations from the contract documents which were in evidence. It also contained expressions of engineering opinion.

This analysis was introduced on the State's direct case in the testimony of a highly experienced licensed professional engineer, Frank Lilien. Mr. Lilien testified that if asked questions with respect to what was incorporated in the report he would testify substantially as set forth (A 2969).

Petitioner indicates Mr. Lilien did not prepare any of the report (Br., p. 6). Mr. Lilien did not write the report but read and edited it (A 2971, 2978, 3034). Mr. Lilien devoted considerable time going over the report before its presentation (A 2971).

In the same trial before the claims analysis was offered, petitioner offered with the testimony of petitioner's soils expert, Dr. Rutledge, a soils report volume which was not prepared by that witness. Instead it was prepared by personnel of Dr. Rutledge's firm. Like Mr. Lilien, Dr. Rutledge reviewed the draft and made certain changes (A 1698).

Dr. Rutledge had no personal knowledge of the design or construction of this project other than from looking at the records (A 1750). By contrast Mr. Lilien, the proponent of the claims analysis, lived with the project. He was the consultant's partner-in-charge during its performance (A 2967). He personally visited the project on many occasions.

Mr. Lilien was tendered to petitioner for cross-examination in connection with the report (A 2980). Petitioner engaged in extensive cross-examination of its contents (A 2980-3045). Thereafter petitioner did not seek to present any rebuttal.

After hearing all the evidence, the Court of Claims rendered a detailed and extensively documented decision in this matter (Br., pp. A6-A58, A3308-3370). This decision incorporated numerous findings of facts relating to the many issues raised by the claim.

Petitioner indicates that the decisions appealed from involve an undesirable interpretation of the New York Court of Claims Act which establish different rules of evidence for complex construction claims in the future (Br., pp. 11). This does not present a federal question. "As to the admission of the award and the receipt in evidence, the rulings involved the application either of the general or the local law of evidence, and as such furnish no grounds for our interposition." *Sherman v. Grinnell*, 144 U.S. 198, 202 (1892). Petitioner also implies reviewability because the project was constructed with federal aid (Br., pp. 3, 12). This likewise does not present a federal question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: June 29, 1978

Respectfully submitted,

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